FILED
JUL 16 1951
OFFICE OF THE CLERK
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1951
No. 190

AMERICAN STORES COMPANY,
Petitioner

vs.

GUSTAVE BETTERMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI

JOSEPH GILFILLAN,
GILFILLAN, GILPIN & BREHMAN,
Liberty Trust Building,
Philadelphia, Penna.
GEORGE M. SPENCE,
SPENCE, CUSTER, SAYLOR & WOLFE,
Johnstown Bank and Trust Building,
Johnstown, Penna.,
ROBERT H. SHERTZ,
SHERTZ, BARNES & SHERTZ,
226 South 15th Street,
Philadelphia, Penna.,
Attorneys for Petitioner.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
Frank J. Myers, Cambria County Representative, Ebensburg, Penna.

INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI:	
Opinions Below	1
Jurisdiction	2
Questions Presented	6
Statute Involved	7
Statement	7
Specifications of errors to be urged	11
Reasons for granting the writ	11
Conclusion	19
APPENDIX A:	
Interstate Commerce Act as added August 9, 1935, otherwise known as the Motor Carrier Act of 1935, as amended September 18, 1940:	
Section 318	20
Section 320	22
Interstate Commerce Commission Motor Carrier Regulations, Part 189:	
Section 187.9 (p)	23
Section 187.9 (r)	23
APPENDIX B:	
Opinion of the Supreme Court of Pennsylvania	24

TABLE OF CITATIONS

Ex Parte No. MC-9, 41 M. C. C. 527 13

Ill. R. R. Co. v. B. & O. R. R. Co., 320 U. S. 5081; 64 Sup. Ct. Rep. 322; 88 L. Ed. 259 12

Mexican Light & Power Co. Ltd. v. Texas Mexican Ry. Co., 331 U. S. 731; 67 Sup. 1440; 91 L. Ed. 1779 12

Nutt v. Knut, 200 U. S. 12; 26 Sup. Ct. Rep. 216; 50 L. Ed. 348 11

St. Louis I. M. & S. R. Co. v. Taylor, 120 U. S. 281, 293; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061 11

Shipman Bros. Transfer Co., Contract Carrier Application, 30 M. C. C. 229 15

Southern Railway Co. v. Crockett, 234 U. S. 725; 34 Sup. Ct. Rep. 897; 59 L. Ed. 1564 11

STATUTES:

28 U. S. C. A.

Section 1257 (3) 2, 11

Interstate Commerce Act, Part II 2, 4, 7, 11, 12

1937 P. L. 1053, 66 P.S. 1101 8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1951
No.

American Stores Company,
Petitioner,

v.

Gustave Betterman,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

American Stores Company prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on April 17, 1951.

OPINIONS BELOW

The Opinion of the Court of Common Pleas of Cambria County, Pennsylvania (R. 1199a-1261a) is unreported. The Opinion of the Supreme Court of Pennsylvania (Appendix B. infra, pp. 24-28) is reported in 367 Pa. 193 (Pa. Advance Reports, Vol. 59, No. 19 issued May 11, 1951).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 17, 1951 after application for reargument was refused. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257 (3).

The Federal question sought to be reviewed was raised in the trial court by Defendant's Thirteenth Point for Charge and the trial court's refusal to charge as requested (R. 1132a, 1160a); by plaintiff's Second Point for Charge and its affirmance (R. 1135a-1136a); and by plaintiff's Thirteenth Point for Charge and its affirmance (R. 1142a-1147a). It was further touched upon by the court in its Charge (R. 1149a). With respect to these points for charge the trial court charged the jury that any schedule of charges required to be filed by the plaintiff below with any regulatory body having jurisdiction (Interstate Commerce Commission) was confined to the minimum charges contemplated by the contract relied upon by the plaintiff below, in spite of the fact that the contract relied upon had not been filed by him with the Interstate Commerce Commission as required by Part II of the Interstate Commerce Act, as amended, and the rules and regulations of the Interstate Commerce Commission. The trial court further charged that it was for the jury to determine whether the contract, under which a schedule of minimum rates actually charged and maintained had not been filed with the Commission, as required by Part II of the Interstate Commerce Com-

mission, as amended, and the rules and regulations of the Commission, fixed the compensation due the carrier (plaintiff below) from the shipper (defendant below). Defendant below (petitioner) excepted generally to the Charge of the Court and specifically to the trial court's ruling upon the above referred to Points for Charge (R. 1156a).

The question was considered by the trial court in its Opinion (R. 1239a, 1241a, 1242a-1243a, 1249a-1254a). At R. 1239a the trial court stated that since the jury had found that the contract in suit included out of state transportation, the only question remaining was whether as a matter of law the Court should have ruled that the contract in suit did not include out of state transportation (Interstate Commerce).

At (R. 1241a) the Court said:

> "The evidence shows that this agreement (an agreement between the parties as carrier and shipper executed in 1939 and filed by the carrier with the Interstate Commerce Commission) was prepared by the defendant solely for the purpose of complying with the requirements of the Interstate Commerce Commission that a contract providing minimum rates be filed with it."

At (R. 1242a-1243a) the Court said:

> "A reading of the whole Record in this case can lead to no other conclusion but that the American Stores Company and the plaintiff and other contract carriers engaged in interstate hauling never intended the contract of 1939 (contract filed

with the Interstate Commerce Commission) to have any bearing upon their real compensation, and on the contrary did intend that the contract of 1937 (contract sued upon but not filed with the Interstate Commerce Commission), including its guarantee provision, should apply to all transportation done by them out of Johnstown to all points within or without the State of Pennsylvania. The former was a mere formality and the latter was the only contract between the parties."

At (R. 1249a-1254a) the Court discussed Section 218 of Part II of the Interstate Commerce Act, as added August 9,1935, and quoted rules and decisions of the Interstate Commerce Commission adopted prior to the amendment of said Section in 1940, and superseded by rules, orders and decisions of the Commission adopted and promulgated after said amendment. The Court concluded that the contract of 1937 (sued upon but not filed with the Interstate Commerce Commission) controlled compensation due by the shipper to the carrier.

The Federal question was further raised before the Pennsylvania Supreme Court by the Statement of Questions Involved as stated and printed in compliance with Rule 35 of said Court on the first page of Petitioner's Brief, the first and second of which questions were as follows:

"1. Can a contract carrier by motor vehicle recover compensation for intrastate and interstate hauling in excess of his rates filed and published respectively with the Public Utility Commission

and the Interstate Commerce Commission? Affirmed."

"2. Where a contract for interstate hauling and a schedule of the carrier's minimum commodity rates actually maintained and charged are on file with the Interstate Commerce Commission, can a guarantee of minimum compensation contained in an intrastate contract be extended to interstate hauling by the conduct of the parties alone? Affirmed."

Apropos of this question the Pennsylvania Supreme Court in its Opinion (367 Pa. 193, 201-202; Appendix B. infra pp. 31-32) said:

"Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that *they were the only charges or rates which could legally be collected.* Regardless of any technical violation by plaintiff of the Interstate Commerce Act the present suit of the plaintiff does not violate the public policy expressed by said Act since plaintiff is making *no attempt to collect less than the minimum rates* on file with the Commission, but rather to collect the *additional compensation guaranteed by his 1937 contract* with this defendant and impliedly referred to in their 1939 contract.

"The Interstate Commerce Commission is concerned with *minimum* rates for contract carriers. Throughout the Interstate Commerce Act every

contract carrier by motor vehicle must 'establish and observe reasonable *minimum* rates and charges'; he must file with the Commission 'schedules containing the *minimum* rates or charges'; and throughout the provisions pertaining to contract carriers all the language refers to *minimum* charges. The commission itself recognized in its decisions that *it was concerned solely with minimum* charges, and prohibiting the payments or acceptance of payments *below the minimum* rates fixed in the schedules filed: see Ex Parte No. MC-9, 2 M. C. C. 55. In this opinion, the Commission said: 'No need exists as to such carriers for protecting the public against exorbitant charges because the contracting shippers are well able to protect their own interest in this respect. The *patent object of Congress is to protect common carriers against cut-throat competition'*: Ex Parte No. MC 12, 2 M. C. C. 628, 629."

QUESTION PRESENTED

Whether a contract carrier by motor vehicle can recover compensation for interstate transportation under an intrastate contract which was not filed with the Interstate Commerce Commission when the compensation claimed exceeds that stated in the schedule of rates or charges published and kept open for public inspection by the carrier.

STATUTE INVOLVED

The Statute involved is Part II of the Interstate Commerce Act as added August 9, 1935, otherwise known as the Motor Carrier Act of 1935, as amended September 18, 1940. The pertinent statutory provisions thereof are printed in Appendix A infra pp. 20-23. The pertinent rules, regulations and orders of the Interstate Commerce Commission promulgated under the pertinent statutory provisions are likewise printed in Appendix A. infra p. 23.

STATEMENT

Gustave Betterman, a contract carrier by motor vehicle, filed his Complaint in Assumpsit against American Stores Company, his shipper, in the Court of Common Pleas of Cambria County, Pennsylvania, on December 13, 1947 (R. 1a, 5a-9a). The action is upon a written agreement between the carrier and shipper dated August 30, 1937 (R. 10a, 1051a-1055a), and was for additional compensation in excess of that already paid carrier by shipper for transportation rendered by carrier to shipper for the period from September 1, 1941 to August 30, 1948 in the total amount of $16,053.13, with interest. A number of other suits by other contract carriers are pending upon the same contract against this shipper (R. 204a, 302a, 361a). The case was reached for trial February 14, 1949 before Judge Ivan J. McKenrick and a jury (R. 56a). In August,

1936, Betterman, along with either eighteen or nineteen other motor carriers (R. 194a-195a), undertook to transport property as contract carriers by motor vehicle between points in Pennsylvania (R. 61a, 97a). On June 1, 1937, the Pennsylvania Public Utility Law became effective (1937 P. L. 1053, 66 P. S. 1101, etc.), and Betterman and the other carriers applied to and obtained contract carrier permits from the Pennsylvania Public Utility Commission (R. 73a, 1056a-1058a). At this time the contract sued upon was reduced to writing and executed by the parties (R. 59a-61a). This contract provided for transportation "within the area of the State of Pennsylvania" (R. 1052a). The compensation to be paid carrier was on a cost plus basis (R. 1055a). At the time of trial, under cross-examination Betterman admitted that he had entered into a contract under date of December 4, 1939 with American Stores Company for the transportation of its property in interstate commerce (R. 161a-162a), and this agreement was offered in evidence by the defendant below (R. 1076a-1080a). This interstate agreement provided for transportation between points in an area consisting of parts of Pennsylvania, Maryland, Virginia and West Virginia. The compensation to be paid plaintiff for interstate hauling was fixed on a ton mile basis, and no provision for a cost plus basis was made (R. 1078a).

Betterman then applied to the Interstate Commerce Commission for an interstate contract carrier permit, and the interstate contract of December 4, 1939 and a schedule of plaintiff's minimum commodity charges were filed with the Interstate Commerce Com-

mission (R. 90a-91a, 113a 161a-162a, 1080a-1082a). An interstate permit was issued on January 9, 1940 to the plaintiff below. (R. 59a, 1059a-1060a).

On September 30, 1940 plaintiff below filed with the Pennsylvania Public Utility Commission a schedule of his rates for interstate hauling effective as of November 16, 1937, stated in cents per hundred pounds (R. 85a-87a, 1082a-1088a). Throughout the entire period in suit plaintiff below admits that he was paid by the defendant below for transportation rendered both in intrastate and interstate hauling compensation in excess of the rates filed by him with the Pennsylvania Public Utility Commission and the Interstate Commerce Commission respectively (R. 144a, 148a). During each of the years in suit the following percentages of the total revenues received by plaintiff below were paid him by defendant below for transportation in interstate commerce: 20.5% during the fiscal year ending in 1942; 18.8% during the fiscal year ending in 1943; 30.5% during the fiscal year ending in 1944; 35.7% during the fiscal year ending in 1945; 34.7% during the fiscal year ending in 1946; 38.9% during the fiscal year ending in 1947; and 36.8% during the fiscal year ending in 1948 (R. 846a-847a, 1003a). To prove the full annual cost of the average or typical operator rendering transportation service to the defendant below, plaintiff's accountant examined the records of six carriers, four of whom were engaged entirely in intrastate hauling and two of whom were engaged partially in intrastate hauling and partially in interstate hauling (R. 848-852a, 854a-860a, 1004a, 1062½a-1075a). The Court submitted to the jury the

question as to whether the intrastate contract of August 30, 1937 controlled the compensation due plaintiff below for intrastate hauling only or for both interstate and intrastate hauling (R. 1132a, 1160a), refusing defendant's Point for Charge to the contrary. The jury's verdict was in favor of the plaintiff for the full amount claimed by him (R. 1162a), which covered hauling both in interstate and intrastate commerce, on the basis that the contract of August 30, 1937 applied to both intrastate and interstate hauling.

Defendant below filed motions for judgment non obstante veredicto (R. 1162¼a) and for a new trial (R. 1163a). These motions were denied by the Court of Common Pleas of Cambria County, Pennsylvania, and the entry of judgment in favor of the plaintiff upon the verdict directed (R. 1261a). An appeal to the Pennsylvania Supreme Court followed (R. 4a). The Supreme Court affirmed the judgment of the lower Court (Appendix B. p. 38).

The decision of the Pennsylvania Supreme Court, unless the Supreme Court should hereafter reach a different conclusion, will be precedent for the proposition that a carrier transporting in interstate commerce may enter into a contract with his shipper without complying with the provisions of Part II of the Interstate Commerce Act and the regulations of the Interstate Commerce Commission promulgated thereunder, requiring that all contracts be reduced to writing and filed with the Commission, and that schedules of the minimum rates and charges actually maintained and charged shall be published and filed with the Commission.

SPECIFICATIONS OF ERRORS TO BE URGED

The Pennsylvania Supreme Court erred:

(1) In permitting recovery for interstate hauling under a contract which was not filed with the Interstate Commerce Commission.

(2) In permitting recovery for interstate hauling in excess of the rates or charges contained in the Schedule of Rates and Charges filed and maintained by the carrier with the Interstate Commerce Commission.

(3) In refusing to order a new trial in the Court of Common Pleas.

(4) In affirming the judgment of the Trial Court.

REASONS FOR GRANTING THE WRIT

(1) This Court has jurisdiction in the instant case under 28 U. S. C. A., Section 1257 (3). It involves the construction of Sections 218 (a) and 220 (a) of Part II of the Interstate Commerce Act (Motor Carrier Act of 1935, as amended in 1940), and petitioner (defendant below) insisted in the State Court by way of objections and requests for instructions, upon a construction which will lead to judgment in its favor (*St. Louis I. M. & S. R. Co. v. Taylor,* 120 U. S. 281, 293; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061. *Nutt v. Knut,* 200 U. S. 12; 26 Sup. Ct. Rep. 216; 50 L. Ed. 348. *Southern Railway Co. v. Crockett,* 234 U. S. 725; 34 Sup. Ct. Rep. 897; 59 L. Ed. 1564).

The construction of a contract alleged to govern interstate hauling by motor vehicle which is regulated by the Interstate Commerce Act and regulations and orders of the Interstate Commerce Commission presents a Federal question conferring jurisdiction on this Court. (*Ill. R. R. Co. v. B. & O. R. R. Co.,* 320 U. S. 5081; 64 Sup. Ct. Rep. 322; 88 L. Ed. 259. *Mexican Light & Power Co. Ltd. v. Texas Mexican Ry. Co.,* 331 U. S. 731; 67 Sup. 1440; 91 L. Ed. 1779.

(2) The decision of the Pennsylvania Supreme Court in the instant case, if permitted to stand, will vitiate Section 218 (a) of Part II of the Interstate Commerce Act as added August 9, 1935, c. 498, 49 Stat. 561, as amended June 29, 1938, c. 811, Sec. 17, 52 Stat. 1240; and September 18, 1940, c. 722, Title L, Sec. 1623, 54 Stat. 919, 925. On September 18, 1940 Congress amended Section 218 (a) of said Act by inserting in the second sentence thereof the words, "actually maintained and charged" by way of modification of the phrase "minimum rates or charges." The complete text of this section appears in Appendix A. infra, pp. 20-21. It is to be noted that by the first sentence of Section 218 (a) a duty is placed upon a contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service in interstate commerce. The second sentence places a duty upon every contract carrier by motor vehicle to file with the Commission, publish and keep open for public inspection in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier *actually maintained and charged* for interstate transportation. The third sen-

tence of this section prohibits a contract carrier from engaging in interstate transportation unless the minimum charge therefor have been published, filed and posted in accordance with the provisions of the Motor Carrier Act.

Prior to the 1940 amendment of this section there no doubt was justification for the position that the schedule required to be filed and published under the Act need not contain the actual charges so long as the actual charges were in excess of the minimum set forth in the schedule. By adding the words "actually maintained and charged" in modification of the phrase "minimum rates or charges", Congress must have intended, however, to make it mandatory upon a contract carrier by motor vehicle to file a schedule of the charges actually maintained and charged by a carrier under the contract in effect between the carrier and his shipper. The further result of this amendment was to provide that unless the minimum charges actually maintained and charged have been published, filed and posted in accordance with the law, the carrier must not engage in interstate transportation.

The Interstate Commerce Commission so construed the amended Act in its Opinion in *Ex Parte No. MC-9,* decided December 7, 1942 and reported in 41 M. C. C. 527, where it said:

> "The reasons for the reopening of the proceeding and the invitation to the parties to file suggestions, pertinent to the promulgation of the rule or regulation, lie in the fact that the act, as now amended, imposes the duty upon every contract

carrier by motor vehicle to file with us, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carriers actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges, and the value of the service thereunder. Manifestly the law now lays upon us a duty to see to it that the schedules of contract carriers contain minimum rates or charges which are actually maintained and charged."

* * * * * * * *

"In determining whether schedules offered for filing by contract carriers contained the minimum rates or charges actually maintained and charged by such carriers, it is necessary that we have recourse to the contracts of the carriers in order to compare the rates, charges, and services set forth therein with those specified in the schedules which purport to contain the carriers' minimum rates and charges. A contract, if valid, must specify the service to be performed for the shipper and the carrier's actual rates or charges therefor, or provide for some definite method or formula by which such charges, which constitute the consideration for performance of service under the contract, can be determined."

* * * * * * * *

"We find that, in order properly to administer section 218 (a) of the act, it is necessary to com-

pare the minimum rates and charges stated in schedules of contract carriers of property, as defined in section 203 (a) (15) of the act, with the rates and charges for the same service shown in the contracts between such carriers and the shippers for whom they provide transportation, and that, in order to facilitate such comparison, and pursuant to section 220 (a) of the act, all contract carriers, except those exempted in the order entered in 11 M. C. C. 693, and except as otherwise authorized by us under special permission, with each schedule naming minimum rates and charges for services not included in schedules and contracts on file with us shall file with us at the same time a true copy of the actual contract or proposed contract covering the service for which the minimum rates and charges in said schedules are to apply, and showing the actual rates and charges therefor, or an amendment to a contract on file between such carrier and the same shipper showing such actual rates and charges, and that the order entered with the original report herein, 2 M. C. C. 55, as modified in 11 M. C. C. 693, should be further modified accordingly."

Again in *Shipman Bros. Transfer Co., Contract Carrier Application,* 30 M. C. C. 229, the Commission after quoting in part from Section 218 (a) of the Interstate Commerce Act as amended September 18, 1940 by the Transportation Act of 1940, said:

"It shall be the duty of every contract carrier * * * to file with the Commission * * * sched-

ules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce."

"This amendment substantially altered the law respecting the filing of contract carriers' schedules of minimum rates and charges, which theretofore required merely the filing of 'schedules * * * containing the minimum charges of such carrier for the transportation * * * of property * * * and any rule, regulation, or practice affecting such charges and the value of the service.' This language did not require the filing, publishing, and application of exact rates by contract carriers, which as pointed out in Filing of Contracts by Contract Carriers, 20 M. C. C. 8, were known only to the carriers and their shippers and could be ascertained by other parties only from the contracts."

"It is clear that under the amended act, schedules of contract carriers which fail to show the lowest rates or charges actually maintained for the transportation in the carriers' contracts are unlawful. In the instant proceeding it develops that of the proposed minimum rates only three appear definitely to be the lowest rates which would be actually maintained and charged. * * * We conclude, therefore, that the proposed minimum rates, except the three hereinafter discussed, would be unlawful, in violation of section 218 (a) of the act, because such rates would not be the lowest actually maintained and charged by the

respondents on the commodities and between the points specified in the schedules under consideration."

Furthermore, the Commission so provided in Sections 187.9 (p) and 187.9 (r) of Part 189 of the Commission's Motor Carrier Regulations (Appendix A, p. 23), in which the contents of the schedule of rates and the contract to be filed by carriers with the Commission are regulated.

It follows that if the intrastate contract of August 30, 1937 was intended to cover the interstate hauling by carrier (plaintiff below), this contract was required by Federal law and the regulations of the Interstate Commerce Commission to be filed with the Commission. It likewise follows that by law and the regulations of the Commission it was a legal prerequisite for collecting compensation for interstate hauling under that contract that a schedule of the lowest rates or charges actually maintained and charged thereunder be filed with the Commission. The action of the Trial Court in permitting the jury to determine that the intrastate contract of August 30, 1937 controlled the compensation due the carrier (plaintiff below) for interstate hauling, and the affirmance of this action by the Pennsylvania Supreme Court, amounts to a usurpation of the powers and functions of Congress and the Interstate Commerce Commission by the State Courts. For all practical purposes the decision below destroys the Commission's power to regulate effectively contract carriers by motor vehicles. Moreover, it denies to the shipper (defendant below) a right or immunity under the Interstate Commerce Act as amended allowed by

the direct and positive duties imposed upon contract carriers by motor vehicle under the provisions of that Act.

(3) That the question presented is of importance in the administration by the Interstate Commerce Commission of the Motor Carrier Act of 1935 as amended is obvious. One of the most potent forces available to compel compliance by a carrier with the Act, and the regulations, rules and orders of the Commission, namely, unenforceability of the contract between carrier and shipper until compliance with the Federal law, will be destroyed if the decision of the State Court is allowed to stand.

Settlement of the question by this Court is therefore plainly in the public interest. It is likewise desirable because of the fact that it will be raised repeatedly in the several cases pending against petitioner by other carriers and involving hundreds of thousands of dollars.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH GILFILLAN,
GILFILLAN, GILPIN & BREHMAN,
GEORGE M. SPENCE,
SPENCE, CUSTER, SAYLOR & WOLFE,
ROBERT H. SHERTZ,
SHERTZ, BARNES & SHERTZ,
Counsel for Petitioner,

July 14, 1951

APPENDIX A

§ 318. *Schedules of contract carriers by motor vehicle*:

(a) Establishment, filing, and publication of schedules and rules affecting rates; notice of and hearing on proposed changes; undue preferences. It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter. No reduction shall be made in

any such charge either directly or by means of any change in any rule, regulation or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: Provided, That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.

Feb. 4, 1887, c. 104, Part II, §218 (a), as added Aug. 9, 1935, c. 498, 49 Stat. 561 and amended

June 29, 1938, c. 811, § 17, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, §§ 16, 23, 54 Stat. 919, 925; 49 U.S.C.A. Sec. 318 (a).

§ 320. *Accounts, records and reports:*

(a) Reports to Commission; copies of contracts; publication of information. The Commission is authorized to require annual, periodical, or special reports from all motor carriers, brokers, lessors, and associations (as defined in this section); to prescribe the manner and form in which such reports shall be made; and to require from such carriers, brokers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall be given an account of the affairs of the carrier, broker, lessor or association in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: Provided, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by section 318 (a), the Commission may, in its discretion, make public

such of the [redacted] of the contract as the Commission [redacted] to disclose such failure and the extent [redacted]

Feb. 4, 1887, c. 104, Part II, § 220 (a), as added Aug. 9, 1935, c. 498, 49 Stat. 563 and amended Sept. 18, 1940, c. 722, Title I § 24, 54, Stat. 926: 49 U. S. C. A. Sec. 320 (a).

Interstate Commerce Commission Motor Carrier Regulations, Part 189.

Section 187.9 (p):

> "The table of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged."

Section 187.9 (r):

> "The actual or proposed contract or amendment to a contract, filed in accordance with the provisions of this paragraph, shall show the actual rates and charges for the service to be performed thereunder."

APPENDIX B

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

(Reported in 367 Pa. 193)

Opinion by Mr. Justice Bell, March 27, 1951:

Plaintiff, a contract carrier by motor vehicle, brought an action of assumpsit against defendant for the cost of operation plus a reasonable profit guaranteed him under a written contract dated August 30, *1937,* and recovered a verdict of $16,050.13. Defendant appealed from (the judgment on the verdict which was entered following) the lower court's refusal to enter a judgment n.o.v. or to grant a new trial. What is the proper construction of the contract; was the contract legal; was plaintiff's evidence sufficient to establish his case?—These are the most important questions involved in this appeal. From 1200 pages of testimony we shall briefly summarize the important facts.

Plaintiff was employed by defendant as a truck driver commencing in 1933. In 1936 defendant persuaded plaintiff and other truck drivers of defendant to purchase their own trucks and become contract carriers, orally promising plaintiff (and others) that if they did so they would be given steady work and would make a profit and that their earnings would be considerably increased over those they received as ordinary truck drivers. On August 30, 1937, plaintiff and defendant entered into the aforesaid written contract

which was prepared by counsel for defendant and was subsequently filed by counsel for defendant with the Public Utility Commission of Pennsylvania. A similar contract was prepared by defendant and executed by it and 31 other truck drivers of defendant at approximately the same time. The contract was for a period of one year, renewable automatically for a further term of one year and so on from year to year unless 15 days' written notice was given by either party of his or its intention to terminate the same. The agreement provided that the plaintiff (carrier) would furnish a truck suitable to defendant; that *he would be subject to call at any time;* that he would *personally drive* the truck (in the absence of sickness, etc.); that his truck would be available for loading and transporting defendant's merchandise at such times and places as defendant should designate; that the transportation was to be within the State of Pennsylvania and the contract was to be subject to the laws, rules and regulations of the proper regulatory bodies. There then followed this very important provision with respect to compensation: "9. The parties mutually agree that the compensation for such service outlined above *shall be fixed** but shall vary with the tonnage, mileage, loading and unloading time, number of stops, road and weather conditions. The parties hereto shall from time to time make such adjustments of the compensation as shall be mutually agreed upon by the parties. *Company hereby guarantees to Carrier compensation at least equal to the full cost of operation of the typical or*

---

* Italics throughout, ours.

average operator of the same class as Carrier for similar service, plus a reasonable profit. The minimum of such charges to be paid shall be subject to review, fixing and ascertainment by any regulatory body having jurisdiction thereof."

It will be instantly noted that the *compensation was not fixed* but, because of the indefinite and uncertain services to be rendered by the carrier, the compensation was to vary with a number of varying factors and a cost-plus profit was guaranteed. The importance of this cost-plus clause in the construction of the contract and the question of compensation will hereinafter more fully appear.

Based upon the aforesaid contract, plaintiff, through defendant's counsel, filed an application with the Pennsylvania Public Utility Commission for a contract carrier's permit, which the Commission granted on *November 16, 1937.* On September 30, 1940, defendant, on behalf of plaintiff, filed with the Pennsylvania Public Utility Commission a *schedule of minimum* rates effective November 16, 1937. *This schedule contained the rates based on weight and mileage on a zone basis for two types of commodities.* One of the obvious purposes was to provide plaintiff with some regular compensation for his work as it was performed.

The court below, in a detailed, comprehensive and very able opinion, held—and we agree—that under said contract of 1937 plaintiff was entitled to "the full cost of operation . . . plus a reasonable profit."

The conduct of both plaintiff and defendant clearly indicates that the parties believed and intended the

contract of *1937* to be binding. Not only did the plaintiff so testify, but (a) in *1943* defendant brought an action against plaintiff upon the aforesaid contract of *1937* in which it *averred that said contract was still in full force and effect;* and (b) on February 1, *1944,* defendant and plaintiff entered into a supplemental written agreement amending (in immaterial matters) "the *present* contract entered into between the parties hereto dated the 30th day of August *1937*" and reaffirming and ratifying said contract of August 30, 1937. How then is it possible for defendant to *now* maintain that the parties *intended* to abrogate the contract of 1937 and supersede it by the rates filed with the Pennsylvania Public Utility Commission?

Defendant nevertheless contends that the minimum, maximum and only compensation *legally* payable to plaintiff is that which is in accord with the schedule of rates or charges filed with the Pennsylvania Public Utility Commission; and that (an agreement to pay or) the payment of a larger sum would be illegal. No authority is cited, and we have found none, to support defendant's contention. On the contrary, the Pennsylvania Public Utility Code throughout, and especially in Section 802 (a), 66 P. S., Section 1302, Section 809 (a), 66 P. S., Section 1309; and Section 810, 66 P. S. Section 1310, all refer to *minimum* rates. For example, Section 802 (a) provides: "The commission shall have the power . . . . to regulate contract carriers by motor vehicle . . . . and to that end the commission *may prescribe minimum rates* which are just and reasonable . . . . ." Section 809 (a) provides: ". . . . No such contract carrier shall engage in the

transportation of passengers or property, unless the *minimum charges* for such transportation by such carrier have been filed with the commission, *or copies of all contracts* reduced to writing and filed with the commission. *No reduction shall be made in any charge* .... No such carrier shall .... charge, or collect a *less* compensation for such transportation than the charges filed in accordance with this section .... or by any other device whatsoever, to charge, accept or receive *less than the minimum* charge so filed ...." Section 810 empowers the Commission upon complaint or its own motion to *"prescribe minimum rates"*. No authority is conferred upon the Commission to fix maximum, or maximum and minimum rates of a contract carrier. It follows, therefore, that an agreement of a contract carrier which provides for minimum and maximum rates (cost plus reasonable profit) is not a violation of the Pennsylvania Public Utility Code, especially since in no event could the rates charged by the contract carrier fall below the schedule of minimum rates filed with the Commission.

The purpose of prescribing minimum rates for contract carriers by the Pennsylvania Public Utility Commission was to protect common carriers from cut-throat competition and price-cutting on the part of the contract carriers, as well as to protect the contract carriers from cut-throat competition and price-cutting among themselves. It was felt, and properly so, that such price-cutting or the charging of an unreasonably *low minimum* rate would likely result in the deterioration of equipment and the increase of hazards to the public.

This case was further complicated by the fact that plaintiff claimed for the cost of operation plus reasonable profit for merchandise transported by him *outside* of Pennsylvania under the guarantee clause of the aforesaid contract of *1937*. Defendant prepared and filed with the Interstate Commerce Commission an application for a license for plaintiff, *together with an accompanying contract* made between defendant and plaintiff dated December 4, *1939*. Defendant in this contract guaranteed plaintiff 500,000 pounds of merchandise for transportation during the year. The contract also provided that the compensation for the transportation of such merchandise should be 2¢ *per ton mile* and further provided that *"Nothing in this agreement shall prevent the Company from paying the Carrier reasonable additional compensation* based upon and varying with the type of service, the flow of tonnage and territory involved and served."* Defendant contends that the agreement of *1939* was intended to apply to all transportation *outside* of Pennsylvania and that the plaintiff could legally recover only 2¢ per ton mile. The court below held, and we believe correctly so, that the contract and the schedule of rates and charges filed with the Public Utility Commission and with the Interstate Commerce Commission (1) related only to *minimum* rates and (2) were filed in order to comply with the requirements of each of said Commissions. But the court also found, as did the jury under proper instructions, that the plaintiff and defendant intended the plaintiff to be compensated for

---

*See paragraph 8 of said agreement.

both intra-state and inter-state transportation in accordance with the terms of the guarantee set forth in the aforesaid contract of *1937*. A written agreement may be modified, of course, by a subsequent oral agreement and this modification may be shown by words or conduct, or both. Knight v. Gulf Refining Company, 311 Pa. 357, 361, 166 A. 880. "It is an elementary proposition that any contract can be modified with the assent of both contracting parties, provided, of course, the modification does not conflict with law or public policy." Friday v. Regent Improvement Co., 330 Pa. 481, 485, 199 A. 914; Of course, the subsequent modification must be clearly established. Stoner v. Sley System Garages, 353 Pa. 532, 534, 46 A. 2d 172.

There was sufficient evidence on the question of modification to take the case to the jury. In the first place, the plaintiff and his witnesses testified that it was the intention of the parties, and that they had agreed, that contract carriers would be compensated for both intra-state and inter-state transportation as provided by the *1937* agreement; in the second place the acts and conduct of the defendant corroborated this understanding. For example, the defendant *never* paid the plaintiff 2¢ per ton mile as fixed by the said contract of *1939*. On the contrary, the uncontradicted evidence showed that all transportation *outside* of Pennsylvania was paid for by defendant under the zone rate schedules filed with the Public Utility Commission under the contract of *1937*. Furthermore, the 7½% overall increases and minimum load guarantees agreed upon by plaintiff and defendant in *1946* were applied by both parties *equally to intrastate and inter-*

state transportation. Perhaps most convincing of all, defendant in the detailed record which it kept of plaintiff's transportation services, expenses, etc., *did not segregate* the intra-state and the inter-state hauls or the expenses or payments due under each. It seems too clear for argument that if defendant believed plaintiff was entitled to a specific compensation for transportation services *within* Pennsylvania and to a *different* compensation for transportation services in *inter-state* commerce, it would have *kept a separate record* of and paid plaintiff a different compensation for each of said services. It is also clear that the agreement of *1939* was intended not only to provide for a minimum compensation but also for *additional compensation* for plaintiff. Moreover, as we have seen, defendant in *1943* sued on the contract of *1937* which it said was then still in effect and binding upon the parties; and in *1944* defendant executed an amendment to the *1937* contract. The jury found from adequate evidence and under proper instructions, that the parties intended that the plaintiff was entitled to the cost of operation plus a reasonable profit for both intra-state and inter-state transportation.

Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that *they were the only charges or rates which could legally be collected.* Regardless of any technical violation by plaintiff of the Interstate Commerce Act the present suit of the plaintiff does not violate the public policy expressed by said Act since plaintiff is

making *no attempt to collect less than the minimum rates* on file with the Commission, but rather to collect the *additional compensation guaranteed by his 1937 contract* with this defendant and impliedly referred to in their *1939* contract.

The Interstate Commerce Commission is concerned with *minimum* rates for contract carriers. Throughout the Interstate Commerce Act* every contract carrier by motor vehicle must "establish and observe reasonable *minimum* rates and charges"; he must file with the Commission "schedules containing the *minimum* rates or charges"; and throughout the provisions pertaining to contract carriers all the language refers to *minimum* charges. The Commission itself recognized in its decisions that *it was concerned solely with minimum* charges, and prohibiting the payments or acceptance of payments *below the minimum* rates fixed in the schedules filed: see Ex Parte No. MC-9, 2 M. C. C. 55. In this opinion, the Commission said: "No need exists as to such carriers for protecting the public against exorbitant charges because the contracting shippers are well able to protect their own interest in this respect. The *patent object of Congress is to protect common carriers against cut-throat competition*": Ex Parte No. MC 12, 2 M. C. C. 628, 629.

Bottemueller v. Wilson & Co., 57 Fed. Supp. 766 and Gardner v. Rich Manufacturing Company, 158 Pac. 2d. 23, cited by defendant, are clearly distinguish-

---

*Part 2, section 218, enacted August 9, 1935, C. 498, 49 Stat. 561, as amended, 49 U. S. C. A., section 318, 49 Fed. Code Ann., section 318.

able. Each of them involved a situation where the contract carrier accepted payments *below the minimum rates* fixed in the schedule filed with the Interstate Commerce Commission. The following excerpt from the opinion in the Bottemueller case is illuminating (p. 768): "It was the hauling service that he performed for the defendant and not the statute which gave him the right to claim compensation. All the statute did was to regulate and fix the amount of compensation to be charged and to *forbid the plaintiff* from collecting a *lesser* amount."

That brings us to the next question: was the evidence to prove plaintiff's case sufficient? Plaintiff claims that he is entitled under the contract of *1937* to a "compensation at least equal to the full cost of operation of the typical or average operator of the same class as carrier for similar service plus a reasonable profit." We have already decided that this is the correct construction of said contract. However, the parties vigorously disagree as to what is meant by the "full cost of operation"; what is a "typical or average operator"; "of the same class as carrier"; and what is meant by the words "similar service"; and " a reasonable profit."

It becomes necessary, therefore, to determine what is meant by this controversial clause and whether plaintiff's evidence was adequate. We must remember that plaintiff was a truck driver without a lawyer, and the contract was prepared by defendant's able, experienced lawyer. If, therefore, the contract, or any part of it, is susceptible of two reasonable constructions, "It is an elementary proposition that a written

contract should, in case of doubt, be interpreted against the party who has drawn it; 6 R. C. L. page 854, Sec. 242; White vs. Smith, 33 Pa. 186." Hempfield Township School District vs. Cavalier, 309 Pa. 460, 463, 164 A. 602.

" 'The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.' [citing cases] 'Contracts must receive a reasonable interpretation, according to the intention of the parties .... if that intention can be ascertained from their language.' " Brown vs. Raub, 357 Pa. 271, 287, 54 A. 2d. 35.

" '.... in order to ascertain that intention, the court may take into consideration *the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement*': Slonaker v. P. G. Publishing Co., 338 Pa. 292, 296, 13 A. 2d. 48, 50, 51." Hindman v. Farren, 353 Pa. 33, 35, 44 A. 2d. 241.

How do these principles apply to the facts which were proved in this case? The jury could have found from the evidence, and the contract itself discloses, that the conditions sought to be covered by the contract were so unusual, indefinite, varying, uncertain and unforeseeable; the subject matters involved such as the different kinds, nature and weight of commodities and merchandise; the services to be performed at call; the unknown destinations and uncertain times of performance; and all the surrounding facts and circumstances necessarily made it impracticable and prob-

ably impossible to clearly and with particularity specify in the agreement any detailed method of ascertaining the compensation. The contract itself in effect said that the compensation could not be fixed in advance because of so many uncertain and unknown factors.

Plaintiff offered evidence to prove *the actual cost of operations* on a yearly basis of half a dozen contract carriers, who, according to the evidence were typical or average and in the same class, and rendered similar service as plaintiff, in that they all hauled about the same load irrespective of the size or weight of their trucks, and they all did approximately the same transportation work; and then the plaintiff struck an average cost of operations therefrom. Defendant alleges that this was an incorrect method of ascertaining cost.

Defendant does not allege what particular yardstick should be adopted but says that the clause in question means, if it means anything, "the full operating cost for a reasonable unit of service rendered, such as a ton mile or a zone ton or some other reasonable unit." In other words, defendant admits the clause is capable of any one of several constructions; but not the construction placed upon it by plaintiff. Defendant's theories and arguments as to a reasonable interpretation of each element in this clause are, when applied to the facts and attendant circumstances, specious but impractical, unreasonable and unsound. The court below found that the record was replete with testimony showing the impracticability, if not impossibility, of figuring out costs on any ton mile or zone ton or other unit basis. No one could reasonably expect a truck driver

to keep books on any such basis. If a cost accountant had been employed by a truck driver to compute costs per ton mile or per zone ton, he would have had to qualify every figure he arrived at by explaining that this figure was a cost per ton mile for hauling certain commodities in certain loads over certain routes with the figures changing and varying with different commodities, loads, roads and weather conditions. That would be ridiculous. On the other hand, taking as plaintiff did, the total costs of half a dozen typical carriers on a yearly or other basis and then averaging the cost would give a reasonable, practical and substantially accurate measure of the full cost of operation within the meaning and intent of paragraph 9 of the agreement of *1937*.

Defendant next contended that a typical or average operator was one whose truck weight was for licensing purposes the same as plaintiff's. This theory is refuted first by the facts, and secondly by the testimony. For example, only *one* of the eighteen contract carriers serving defendant under the original agreement operated a "U" truck, and only one a "V" truck, and only one a "ZZ" truck. Under defendant's theory these carriers could recover no guaranteed cost and profit under the contract of 1937 because there could not be a typical or average operator in their class. Moreover there was testimony that the six witnesses for plaintiff all took about the same load as plaintiff, irrespective of the weight or size of their truck; and there was likewise sufficient evidence (giving plaintiff as we must on a motion for judgment n. o. v. the benefit of every fact and every reasonable inference of fact aris-

ing therefrom and viewing the testimony in the light most advantageous to the plaintiff)* to enable the jury to find that these witnesses were typical or average contract carriers of the same class as plaintiff and that they rendered similar service.

Defendant also contended that the court below erred in holding (1) that the testimony of plaintiff and his witnesses as to the estimated time devoted to serving the defendant under their contracts was admissible; and (2) that plaintiff was entitled to compensation for himself in computing his cost; and (3) that the Union wage scale was applicable and therefore admissible as an element of cost in computing plaintiff's own allowable salary or cost; and (4) that the testimony of plaintiff's certified public accountant was admissible; and (5) that plaintiff's evidence was sufficient to make out a prima facie case for the jury.

Defendant attacked most vigorously the admissibility of the testimony of plaintiff's certified public accountant who had examined and testified with respect to the costs of the aforesaid six contract carriers in the same class as plaintiff. Proof of the costs of operation and a reasonable profit in an unusual case such as this would obviously be difficult, and the problem must necessarily be approached from a practical and reasonable consideration of the situation of the parties, the nature of the subject matter of the contract and all the surrounding circumstances, as well as the objects the parties had in view. Taking into con-

---

* McDonald v. Ferrebee, 366 Pa. 543; Welch v. Sultez, 338 Pa. 583.

sideration all of these factors and elements, the testimony of plaintiff's certified public accountant was both admissible and adequate. See Wigmore on Evidence Third Edition, Section 1230, pages 434-437.

The rule with respect to a claim for compensation for services rendered and accepted is well stated in Lach v. Fleth, 361 Pa. 340, 352, 64 A. 2d 821: "The law does not require that proof in support of claims for damages or in support of claims for compensation must conform to the standard of mathematical exactness. In Western Show Co., Inc. v. Mix, 308 Pa. 215, 162 A. 667, we held that *evidence* in support of a claim for damages *was sufficient 'if it afforded a reasonably fair basis'* for calculating the plaintiff's loss. The same rule applies when the claim is for compensation for services rendered and accepted. If the facts afford a reasonably fair basis for calculating how much plaintiff is entitled to such evidence cannot be regarded as legally insufficient to support a claim for compensation." See also to the same effect, Weinglass v. Gibson, 304 Pa. 203, 155 A. 439; and Asterling v. Frick, 284 Pa. 397, 131 A. 250.

We find no merit in these or in any other contentions made by defendant, all of which we have considered but deem it unnecessary to discuss. We believe that plaintiff's construction of the contract was reasonable; that the contract was legal; that considering the extraordinary circumstances and conditions involved in this contract, plaintiff's proof was sufficient to establish his claim; and that substantial justice was rendered in this unusual case.

Judgment affirmed.

Office-Supreme Court, U.
FILED
AUG 13 1951
CHARLES ELMORE CROPLE
CLER

IN THE

Supreme Court of the United States

October Term 1951

No. 190

AMERICAN STORES COMPANY,
Petitioner

vs.

GUSTAVE BETTERMAN,
Respondent

RESPONDENT'S BRIEF ON PETITION FOR A WRIT OF CERTIORARI

PHILIP N. SHETTIG,
SHETTIG & SWOPE,
Ebensburg, Pennsylvania,
FRANK A. SINON,
RHOADS & SINON,
State Street Building,
Harrisburg, Pennsylvania,
Attorneys for Respondent.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX

PAGE

Respondent's Brief on Petition for Writ of Certiorari:

I. The Background Facts 1

II. The Petitioner's Contentions 5

III. No Federal Question, but solely a Matter of Local Contract Law is Here Involved 7

(a) The Petitioner, by its Own Conduct, is Precluded from Asserting the Defense herein raised 7

(b) No Contravention of the Policy of the Interstate Commerce Act is Involved .. 10

IV. Conclusion 14

TABLE OF CASES, TEXTBOOKS AND STATUTES CITED

CASES:

Bankers Surety Company v. Willow Springs Beverage Co., 104 Neb. 173, 176 N.W. 82 (1920) 10

Barna v. Clifford Country Estates, Inc., 143 Misc. Rep. 813, 258 N.Y. Supp. 671 (1932) 10

Ex Parte No. MC 12, 2 M.C.C. 628, 629 11

Holly v. Florala Telephone, 223 Ala. 415, 136 So. 726 (1931) 10

Judson vs. Buckley, 130 F. 2d 174, (1942) 13

Michener v. Watts, 176 Ind. 376, 96 N.E. 127 (1911) .. 10

In Re Sylvester's Estate, 195 Iowa Rep. 1329, 192 N.W. 442 (1923) 10

TEXTBOOKS:

Restatement of Contracts, Section 599 10

Restatement of Contracts, Section 600 10

V. Williston on Contracts (Rev. Ed.) Section 1631 at Page 4572 10

STATUTES:

Section 218a of Part II of Interstate Commerce Act .. 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1951

No. 190

American Stores Company, Petitioner

vs.

Gustave Betterman, Respondent

RESPONDENT'S BRIEF ON PETITION FOR A WRIT OF CERTIORARI

I. THE BACKGROUND FACTS

Gustave Betterman, the plaintiff in this lawsuit, was employed in 1933 by American Stores Company, the defendant and petitioner herein, as a truck driver, working out of its warehouse in Johnstown, Pennsylvania, and hauling to the Company's stores situated in parts of Pennsylvania, Maryland, West Virginia and Virginia. In 1936 American Stores Company persuaded him and its other truck drivers to purchase

their own trucks and become independent contract carriers (R. 61a and 97a). This was done pursuant to an oral agreement to the effect that they would be given steady work and would make a profit and that their earnings would be better than they had been (R. 61a)—that their compensation would be considerably increased over the wages they would receive as ordinary drivers (R. 97a and 102a).

In August of 1937 the oral agreement was replaced by a written contract, which was drafted by the Company and put in mimeographed form. The plaintiff was called in and told to sign it and he and the other truckers all signed this identical contract at the same approximate time (R. 452a, 490a-491a, 594a-595a and 611a-612a). Because of the many variables involved in the transportation services to be rendered no specific compensation was fixed in the contract. A schedule of rates, based on weight and mileage on a zone basis, was adopted concurrently with the execution of the contract to assure the carrier regular compensation for his work as it progressed. Since these scheduled rates might or might not, over the term of the contract, give the carrier the profitable results promised, the contract provided that the parties would from time to time make adjustments thereof and the Company guaranteed, in any case, that the carrier would receive compensation "at least equal to the cost of operation of the typical or average operator of the same class as carrier for similar service, plus a reasonable profit" (R. 1055a).

The plaintiff sued the defendant on this contract of 1937 to recover the difference between what he received under the schedule of rates and the com-

pensation that he had been guaranteed under the cost-plus-a-profit formula. The jury awarded the plaintiff a verdict, which was sustained by the court en banc, which judgment, in turn, was affirmed by the Supreme Court of Pennsylvania.

In 1940 American Stores Company, by its legal counsel, prepared an application for a contract carrier permit for the plaintiff and filed it, together with a copy of the contract of 1937 and the accompanying schedule of rates, with the Pennsylvania Public Utility Commission. It did the same for the other carriers (R. 164a, 485a-486a, 491a-495a, 590a, 609a-611a, 1082a, 1089a). In due course plaintiff received a contract carrier permit from the Commission through the Company (R. 1056a).

The Company also, through its legal counsel, prepared a contract dated December 4, 1939 (R. 1076a), which purported to be an agreement for transportation in interstate commerce to be performed by the plaintiff for it and filed this, together with an application and tariff, with the Interstate Commerce Commission on behalf of the plaintiff. It did the same for other carriers (R. 113a, 163a, 167a-169a, 179a, 251a, 1080a). This contract provided that the compensation was to be two cents per ton mile and expressly stated that "nothing in this agreement shall prevent the company from paying the carrier reasonable additional compensation based upon and varying with the type of service, the flow of tonnage, and territory involved and served." (R. 1078a). The schedule filed with the Commission stated that "the minimum charge is two (2) cents per ton mile" (R. 1081a).

The plaintiff and the other contract carriers for whom American Stores thus procured Interstate Commerce Commission permits were never paid according to the two cents per ton mile rate fixed in the purported contract of 1939. They were always paid pursuant to the contract of 1937 and its accompanying schedule, which payments always exceeded this two cents per ton mile minimum (R. 147a-148a, 680a). This contract was prepared by defendant's counsel solely for the purpose of complying with the requirements of the Interstate Commerce Commission that a contract guaranteeing a minimum amount of work and a minimum rate be filed with it (R. 161a-162a) and it never, at any time, affected the compensation received by the carriers.

The contract of August, 1937, from its inception down through 1947, was treated by both parties to it as covering and including all transportation, whether within or without the State. It was the only contract between the parties and it governed all of plaintiff's transportation services for defendant. The jury so found these facts.

II. THE PETITIONER'S CONTENTIONS

With this background, we are ready to scrutinize the contention now advanced by defendant to deprive this plaintiff of the compensation it promised to pay him in the contract of 1937. Initially, defendant concedes that, as of the time of the filing of the application with the Interstate Commerce Commission, the schedule required to be filed and published did not need to contain the actual charges, so long as those actual charges were in excess of the minimum set forth in the schedule (Petition p. 13). Hence, the filing of the contract of 1939 and the schedule of minimum rates was in compliance with the law, although the actual, and higher compensation was paid pursuant to the contract of 1937 and its accompanying schedule. But, says the defendant, after the Interstate Commerce Act was amended in 1940 and the Interstate Commerce Commission promulgated regulations thereunder, it became necessary for contract carriers to file schedules containing "the minimum rates or charges of such carriers actually maintained and charged" and to file a copy of the actual contract covering the service for which the minimum rates in said schedules are to apply.

From this, American Stores Company contends and, in effect, says: Since our counsel (who represented the plaintiff and the other carriers throughout with respect to the applications and filing of papers with the Pennsylvania Public Utility Commission and the

Interstate Commerce Commission) omitted to file a copy of the contract of 1937 with the latter Commission, the plaintiff has violated the law—hence he is not entitled to recover one cent of the compensation we guaranteed him in our contract for the interstate transportation services which he rendered to us! The Supreme Court of Pennsylvania was not impressed by this proposition. It decided that the Company should perform its part of the bargain, too.

The defendant contends that that decision involves an important question of construction of a Federal statute; that it will be a precedent for the proposition that a carrier transporting in interstate commerce may enter into a contract with his shipper without complying with the provisions of the Interstate Commerce Act and the regulations of the Commission; that it will vitiate Section 218(a) of Part II of the Interstate Commerce Act; and that it amounts to a usurpation of the functions of Congress and the Commission and, in effect, destroys the Commission's power to regulate contract carriers by motor vehicles. The decision does no such thing.

III. NO FEDERAL QUESTION, BUT SOLELY A MATTER OF LOCAL CONTRACT LAW, IS HERE INVOLVED

The Pennsylvania Supreme Court did not, nor was it required to, pass upon the exact meaning of Section 218(a), nor upon the meaning or validity of the regulations promulgated by the Commission thereunder. It conceded that there was a technical violation thereof by the failure to file the contract.[1] No question as to a definitive interpretation of the Act or regulations was before that Court, nor was the question as to whether a wilful violator or one who violates the basic policy and purpose of the Act may employ that Court to profit by his illegality. *The sole question before the Court was one of Pennsylvania contract law.* All that the Court decided was that this plaintiff, under all of the facts and circumstances in this particular case, was entitled to enforce his contractual rights despite a technical violation of the Act or regulations. A further consideration of the facts will demonstrate this beyond question.

(a) The petitioner, by its own conduct, is precluded from asserting the defense herein raised.

The plaintiff was an ordinary truck driver working for American Stores Company for wages. He did not

[1] The opinion states: "Regardless of any technical violation by plaintiff of the Interstate Commerce Act * * *." (Petition Appendix B, p. 31).

and could not be expected to be familiar with the provisions of the Interstate Commerce Act, as amended, or of the technical regulations of the Commission, as changed from time to time. American Stores Company, on the other hand, was familiar with this specialized body of law. It, through its legal counsel, represented this plaintiff in all of the proceedings before the Interstate Commerce Commission.

For many years this plaintiff fully performed his obligations under the contract and American Stores Company reaped the benefit of those transportation services. Throughout these years, while the contract was serving its purpose, the Company never questioned its validity and enforceability. *It paid the plaintiff in accordance with the schedule of rates accompanying the contract of* 1937 *for his interstate as well as his intrastate hauling.* When, in September, 1943, the plaintiff and the other carriers staged a work stoppage because the Company had refused to raise those rates, so as to meet the contract guaranteed compensation (R. 83a-84a), the Company brought an action against the plaintiff upon the contract of 1937, averring that it was in full force and effect (R. 159a—most of this evidence is omitted from the printed record, but it is noted in the opinion of the trial court at R. 1243a-1244a).

In 1944, the Company prepared a supplemental agreement in mimeographed form, which it had the plaintiff and other carriers sign, which merely changed the time for giving notice of termination and the wording as to the carrier's duties and provided that: "It is the intent of the parties hereto to be bound by and

reaffirm the said contract of August 30, 1937, as changed and amended herein" (R. 1062a). When, in 1946, the Company agreed to a flat 7½ percent increase, which was less than the carriers demanded and less than what was needed to give them the guaranteed compensation, such was merely applied to the schedule of rates accompanying the contract of 1937 and applied alike to interstate and intrastate transportation (R. 142a, 201a, 386a-387a).

Thus, American Stores Company, which was familiar with the law, was governed by and insisted upon plaintiff's performance of the contract of 1937 all along. It was only when the plaintiff brought suit in 1947 to compel performance of its contractual guarantee of compensation that it for the first time retroactively cried illegality. The Supreme Court of Pennsylvania merely concluded, as a matter of sound contract law, that it did not lie in the mouth of the Company to utter this cry of succor at this stage of the game—that it was in no position to deprive this trucker of the compensation which the contract guaranteed him for these services rendered over the years merely by asserting that its counsel, upon whom the trucker relied, had committed a technical violation of the filing requirements.

Whatever illegality there may be in this case, it was the creature of the defendant Company, not of the plaintiff. The Company now says that this decision denies to it a right or immunity under the Interstate Commerce Act (Petition, p. 17). More accurately, this case merely decides that the Company, having asserted its rights under the contract to the full, cannot use a

situation for which it is responsible as a technicality to shield it from performance of its correlative duties.

The instant case presents a perfect illustration for application of the firmly entrenched principle of contract law that illegality does not preclude recovery on a contract where such illegality was due to statutory or executive regulations relating to a particular business, which were unknown to the plaintiff who was justified in assuming knowledge thereof by the other party. *Restatement of Contracts,* Section 599; *V. Williston on Contracts (Rev. Ed.),* Section 1631, at page 4572. Other cases illustrating the application of this rule are: *in Re Sylvester's Estate,* 195 Iowa Rep. 1329, 192 N.W. 442 (1923); *Michener v. Watts,* 176 Ind. 376, 96 N.E. 127 (1911); *Barna v. Clifford Country Estates, Inc.,* 143 Misc. Rep. 813, 258 N.Y. Supp. 671 (1932); *Bankers Surety Company v. Willow Springs Beverage Co.,* 104 Neb. 173, 176 N.W. 82 (1920); and *Holly v. Florala Telephone,* 223 Ala. 415, 136 So. 726 (1931). Also apropos is the rule that slight illegality is disregarded. *Restatement of Contracts,* Section 600.

(b) No contravention of the policy of the Interstate Commerce Act is involved.

So far as contract carriers are concerned, the basic purpose of the Interstate Commerce Act is to require such carriers to establish reasonable *minimum* rates and charges and not to accept *less* compensation. Thus, Part II of that Act, Section 218(a), as added August

9, 1935, C. 498, 49 Stat. 561, as amended; 49 U.S.C.A., Section 318(a), 49 Fed. Code Ann., Section 318(a), contains the ever recurring statutory references to minimum rates as follows:

> "It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable *minimum rates and charges* * * *. It shall be the duty of every contract carrier by motor vehicle to file with the Commission * * * schedules containing the *minimum rates or charges* of such carrier actually maintained and charged * * *. *No reduction shall be made in any such charge* * * * except after thirty days notice * * *. *No such carrier shall* demand, charge or *collect a less compensation* for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and *it shall be unlawful* for any such carrier * * * *to charge, accept, or receive less than the minimum charges so filed or prescribed".* (Emphasis supplied)

The Interstate Commerce Commission itself has well stated the basic policy in *Ex Parte No. MC* 12, 2 M.C.C. 628, 629, as follows:

> "No need exists, as to such carriers, for protecting the public against exorbitant charges, because *the contracting shippers are well able to protect their own interest* in this respect. *The patent object of Congress is to protect common carriers against cut-throat competition."* (Emphasis supplied)

It well may be that in forwarding this policy to the utmost, the Commission may and does require such carriers to file the minimum rates actually maintained and to file a copy of the actual contract, so that the Commission may check it against the filed rates. The plaintiff's failure, through the omission of defendant's counsel, upon whom he naturally relied, to file the contract of 1937 violated such Commission requirements; but, at most, such is a technical violation and does not contravene the underlying purpose of the Act. In enforcing that contract by the present suit, the plaintiff does not violate the policy of that Act, since he is making no attempt to collect less than the minimum rates on file with the Commission, which is the conduct that is forbidden, but rather is collecting the additional compensation guaranteed to him. Further, the collection of this guaranteed compensation can cause no harm to common carriers, but is to their advantage and in keeping with the statutory objective.

The instant decision by the Pennsylvania Supreme Court that an innocent, technical violation of an administrative regulation should not deprive a plaintiff of asserting his substantial contract rights, when such assertion does not involve a violation of the policy of the law nor cause harm to those whom the law protects, constitutes simply and solely an application of sound contract law. The Pennsylvania Supreme Court does not purport for one minute to say that this plaintiff or any contract carrier may violate the Interstate Commerce Act with impunity. Neither does its decision prevent the Interstate Commerce Commission from proceeding to impose penalties, or to take such other

action as that Act provides for against this plaintiff for this infringement, if it chooses to do so.

The United States Court of Appeals, Second Circuit, has had occasion to apply this same principle of contract law to a situation closely analogous to the instant one, in the case of *Judson vs. Buckley,* 130 F. 2d, 174 (1942); cert. denied, 317 U. S. 679, 63 S. Ct. 161, 87 L. Ed. 545. In that case the plaintiff, a retired industrialist, was suing the defendant, a lawyer, to enforce an agreement with reference to the sale of certain securities and to require an accounting for syndicate profits. The agreement included the filing of a registration statement with the Securities and Exchange Commission which contained false statements; and it appeared that the plaintiff subsequently realized this and took no steps to have it amended. The District Court refused to enforce the agreement because of the faulty registration statement and, on appeal, the Commission filed a brief as *amicus curiae* seeking to have the judgment affirmed.

The Court of Appeals reversed on the ground that, although the propriety of the statements made could not be defended, the violation actually never caused investors in the stock any harm and was of little practical significance, and that the defendant was a lawyer of experience upon whom the plaintiff would inevitably rely in such a complex matter as a registration statement. The opinion referred to the contract principle that a suit for recovery is not barred in cases where the parties are not in pari delicto or where the relation of the illegality to the relief sought is indirect and remote.

IV. CONCLUSION

The defendant failed in its attempt to avoid its contractual obligations by pleading a technical filing omission for which it was really responsible, because it was met with a sound and equitable principle of contract law. Now it is attempting to accomplish this same thing by pleading that the decision in this case involves an important question of construction of a federal statute. This attempt must meet with the same fate, for this decision does not involve any general construction or application of the Interstate Commerce Act, nor does it act as a precedent with respect to the filing requirements of that Act or the regulations thereunder. On the contrary, this decision arises from the application of Pennsylvania Contract Law to all of the facts and circumstances peculiar to this case; and that law is in keeping with the law of other jurisdictions and of our federal courts.

For these reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP N. SHETTIG,
SHETTIG & SWOPE,
Ebensburg, Pennsylvania,
FRANK A. SINON,
RHOADS & SINON,
State Street Building,
Harrisburg, Pennsylvania,
Attorneys for Respondent.